

1 Dale C. Schian, #010445
Michael R. Ross #016735
2 dale.schian@gknet.com
mrr@gknet.com
3 GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
4 Phoenix, Arizona 85016-9225
Telephone: (602) 530-8000
5 Facsimile: (602) 530-8500
Attorneys for Gallagher & Kennedy P.A.
6 and Dale C. Schian

7 Email for Electronic Service and
Court documents: bkdocket@gknet.com
8

9 **IN THE UNITED STATES BANKRUPTCY COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 In re:
12 POTENTIAL DYNAMIX, LLC,
13 Debtor.

Case No. 2:11-bk-28944-DPC
CHAPTER 11

**OBJECTION TO APPLICATION
FOR RULE 2004 EXAMINATION
OF GALLAGHER & KENNEDY
AND DALE SCHIAN**

Hearing Date: January 6, 2022
Time: 10:00 am

19 Gallagher and Kennedy, P.A. (“G&K”) and Dale C. Schian (“Schian”) object to the
20 *Application for Rule 2004 Examination and Production of Documents of Gallagher &*
21 *Kennedy, P.A. and Dale C. Schian* [DE 641] (“Application” and “Objection”). The Court
22 should deny the Application because it is an inappropriate attempt to use Rule 2004 in these
23 proceedings to conduct discovery in litigation pending in Superior Court in a matter
24 unrelated to the debtor or to the administration of this estate. This Objection is supported
25 by the following Memorandum of Points and Authorities, the relevant filings and history in
26 this case, and the attached exhibits.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As this Court is aware, Schian and Jess and Goldberg are litigating issues related to
4 Schian Walker, P.L.C. (“SW”) before Judge Danielle Viola in Maricopa County Superior
5 Court (the “Superior Court Litigation”). The Application, which describes several events
6 related to and in dispute regarding SW, transparently seeks discovery related to the Superior
7 Court Litigation. The Application also admits (2:5-7) that this Court approved G&K’s
8 employment and retention of the Swift and Amazon cases. Although the Application alleges
9 a failure to disclose, the matters set forth below were disclosed by G&K in these
10 proceedings nearly two years ago. Indeed, Jess and Goldberg responded by filing a
11 *Statement of Position and Reservation of Rights Regarding the Employment of Gallagher*
12 *& Kennedy P.A. as Special Counsel* [DE 593].

13 **II. LAW AND ARGUMENT**

14 **A. Rule 2004 Examinations Must Relate to the Debtor or Its Estate**

15 Although the permissible scope of a Rule 2004 examination is broad, it is not without
16 limits. Rule 2004 examinations are *only* for matters related to the debtor, matters that affect
17 the administration of the estate, or the debtor’s right to a discharge. Even the authorities
18 cited in the Application (3:17-23) support that proposition. The Application seeks discovery
19 on none of those things. Instead, the Application seeks discovery for matters outside of
20 those parameters and for matters related to the Superior Court Litigation. The granting of
21 the Application will not affect the debtor’s estate – it will not increase or decrease its costs
22 of administration. The examination of a witness as to matters having no relationship to the
23 debtor’s affairs or no effect on the administration of his estate is improper. *In re Johns-*
24 *Manville Corp.*, 42 B.R. 362, 364 (S.D.N.Y. 1984). Thus, although Rule 2004 permits
25 examinations of “third parties,” the language of the rule makes it evident that an
26 examination may be had only of those persons possessing knowledge of a *debtor’s* acts,
27 conduct, or financial affairs so far as it relates to a debtor’s proceeding in bankruptcy. It is
28 clear that Rule 2004 may not be used as a device to launch into a wholesale investigation

1 of a non-debtor's affairs. *In re GHR Energy Corp.*, 35 B.R. 534 (Bankr. D. Mass 1983).
2 And, it may not be used for purposes of abuse or harassment. *In re Washington Mut., Inc.*,
3 408 B.R. 45, 50 (Bankr. D. Del. 2009). The proposed Rule 2004 examination is
4 inappropriate because it has no bearing on the debtor or the estate.

5 **B. Discovery is not Proper in the Debtor's Case Where There is Pending Litigation**
6 **in the Superior Court**

7 Goldberg and Jess are trying to sidestep the applicable process and limitations in the
8 Superior Court (and the Arizona Rules of Civil Procedure) by using this Court to obtain
9 discovery for the Superior Court Litigation. The "pending litigation rule" applied by many
10 courts precludes a Rule 2004 examination when discovery is available in a pending
11 adversary proceeding. *See In re Blinder Robinson & Co.*, 127 B.R. 267, 274-75 (D. Colo.
12 1991) ("[I]f an adversary proceeding or contested matter is pending, the discovery devices
13 provided for in Rules 7026-7037, which adopt various discovery provisions of the Federal
14 Rules of Civil Procedure, apply and Rule 2004 should not be used."). "The reason for the
15 rule is to avoid Rule 2004 usurping the narrower rules for discovery in a pending adversary
16 proceeding." *In re International Fibercom, Inc.*, 283 B.R. 290, 293 (Bankr. D. Ariz. 2002).

17 Courts have also recognized that Rule 2004 examinations may be inappropriate
18 "where the party requesting the Rule 2004 examination could benefit their pending
19 litigation outside of the bankruptcy court against the proposed Rule 2004 examinee." *In re*
20 *Washington Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009) citing *In re Enron Corp.*, 281
21 B.R. 836, 842 (Bankr. S.D.N.Y. 2002). *See also, Snyder v. Soc'y Bank*, 181 B.R. 40, 42
22 (S.D. Tex. 1994), *aff'd sub nom., In re Snyder*, 52 F.3d 1067 (5th Cir.1995) (mem.)
23 (characterizing the use of Rule 2004 to further a state court action as an abuse of Rule 2004
24 and stating that the bankruptcy court did not abuse its discretion by denying production
25 under a subpoena issued under Rule 2004, where appellant's primary motivation was to use
26 those materials in a state court action against the examinee).

1 **C. The Terms of the Employment Agreement Were Disclosed**

2 The purported justification for the Application is that the terms of G&K's
3 employment were not disclosed. The *Application to Employ Gallagher & Kennedy as*
4 *Special Counsel to Conclude the Representation of the Trustee in Adversary 2:13-AP-*
5 *00799* [DE 579] ("Employment Application") demonstrates that is incorrect. The
6 Employment Application reflects:

- 7 • SW agreed to represent the Trustee on a contingent fee basis. *Id.* at 2:5-6.
- 8 • The attorneys primarily responsible for the representation at SW had left the
9 firm. *Id.* 2:7-9.
- 10 • Goldberg declined to continue with the representation. *Id.* 8-9.
- 11 • G&K was willing to conclude the representation "on an hourly basis," but to
12 limit its recovery "solely to amounts that would otherwise be payable to
13 Schian Walker, all in accordance with the agreement that [was] attached
14 [thereto] as Exhibit "A." *Id.* 2:20-23.
- 15 • All compensation is expressly subject to prior approval by this Court. *Id.* 3:1-
16 6.
- 17 • Exhibit A to the Application is an *Agreement of Counsel*.
- 18 • Exhibit A provides that SW was obligated to perform *three* Agreements as
19 defined in Exhibit A. One in the Swift Adversary, another in the Amazon
20 Adversary, and the Morones Engagement.
- 21 • Exhibit A reflects that SW required the participation of G&K to perform the
22 Agreements.
- 23 • G&K agreed to perform SW's obligation under the Agreements on an *hourly*
24 basis and wait to be paid from the first recoveries under the Agreements.
25 Exhibit A.
- 26 • After G&K is paid its costs and hourly charges, all additional fees and costs
27 due to SW under the Agreements paid to SW. *Id.* at 2.
- 28

1 There was nothing untoward or undisclosed. SW had three Agreements it could not
2 perform. Goldberg and Jess declined to undertake representation when it was offered to
3 them. The clients needed continued representation. G&K was willing to undertake the
4 representation and to fund all of the costs associated with it, on the condition that G&K was
5 paid from the funds otherwise due to SW. G&K advanced substantial sums for experts and
6 deferred payment of over \$2 Million in hourly fees.

7 The Agreement of Counsel protected the former SW clients and protected SW from
8 the consequences of that firm's inability to perform its obligations under the Agreements.
9 G&K has performed SW's obligations for the past two years. Now, after G&K expended
10 substantial effort, time, and energy, and G&K shouldered the substantial costs and time
11 associated with the cases, Goldberg and Jess seek to object to the Employment Application
12 as somehow undisclosed. But that is not accurate nor truthful. The Employment Application
13 *expressly* discloses that:

14 Special Counsel has agreed to work on an *hourly* basis and to be paid its costs
15 and *hourly* fee charges (including any bonus to which Special Counsel may
16 be entitled) *solely from amounts that would otherwise be payable to Schian*
Walker, all in accordance with the agreement that is attached hereto as
Exhibit "A."

17 Employment Application at 2 ¶ 5 (emphasis added). The terms of the employment were
18 fully disclosed and approved. There is nothing unethical or improper about them.

19 Six times, the Application asserts that G&K agreed to undertake the representation
20 on "a contingency fee arrangement." Application at 2:6-7, 2:8, 2:15-16, 2:17-18, 2:25-26
21 and 4:9. As reflected in the Employment Application, G&K did not agree to take over the
22 representation on a contingent fee basis. There's neither an agreement to share the SW
23 contingent fee nor an agreed allocation of the contingency between SW and G&K. G&K
24 fulfilled SW's obligations under the Agreements on an hourly basis while permitting SW
25 to have the benefit of a favorable recovery. Jess and Goldberg's intent is apparent to anyone
26 interested -- having abandoned SW and its obligations under the Agreements, they hope to
27
28

1 participate in the Swift contingency fee,¹ but fear that recovery will be diminished by the
2 cost of performing the other two Agreements.

3 **III. CONCLUSION**

4 The Application is an improper attempt to conduct discovery outside of the Superior
5 Court Litigation concerning matters that do not affect the administration of this estate. The
6 pending litigation rule bars that result. Moreover, the Application is full of inaccuracies and
7 misrepresentations and an improper attempt to interfere with the relationship between G&K
8 and its client. The Application should be rejected.

9 DATED January 4, 2022.

10 GALLAGHER & KENNEDY, P.A.

11
12 By: /s/Dale C. Schian

13 Dale C. Schian
14 Michael R. Ross
15 2575 East Camelback Road
16 Phoenix, Arizona 85016-9225
17 Attorneys for Gallagher & Kennedy P.A.
18 and Dale C. Schian

19 **CERTIFICATE OF SERVICE**

20 I hereby certify that on January 4, 2022, I electronically transmitted the attached
21 document to the following parties:

22 Keith Hendricks
23 Moyes Sellers & Hendricks
24 1850 N. Central Ave., Suite 1100
25 Phoenix, AZ 85004
26 khendricks@law-msh.com

27 ¹ Somewhat inaccurately, the Application twice refers to “the contingency fee portion of
28 the funds that the Swift bankruptcy estate will or may receive as settlement proceeds in
the Swift Litigation.” Application at 2:10-11, 3:5-7.

1 Thomas Allen, Esq.
2 Allen Barnes & Jones PLC
3 1850 N. Central Ave., Suite 1150
4 Phoenix, AZ 85004
5 tallen@allenbarneslaw.com

6 Elizabeth C. Amorosi
7 Office of the U.S. Trustee
8 230 N. 1st Ave., Suite 204
9 Phoenix, AZ 85003
10 Elizabeth.C.Amorosi@usdoj.gov

11 Jennifer A. Giaimo
12 Office of the U.S. Trustee
13 230 N. 1st Ave., Suite 204
14 Phoenix, AZ 85003
15 Jennifer.A.Giaimo@usdoj.gov

16 James E. Cross
17 Cross Law Firm, PLC
18 PO Box 45469
19 Phoenix, AZ 85064
20 jcross@crosslawaz.com

21 /s/Jo Magallanes

22 8779886v6/3-0510